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No. 89-1165

In The

Supreme Court of the United States

October Term 1989

SOUTHWEST FOREST INDUSTRIES, INC.,

Petitioner,

v.

JOHN L. SUTTON,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Tenth Circuit, sitting as a diversity court, properly applied an intervening decision of the Kansas Supreme Court in upholding a 1985 jury verdict against Petitioner Southwest Forest Industries for its retaliatory discharge of Respondent John L. Sutton in 1982, a year after the tort cause of action was created.

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STATEMENT

On July 9, 1982, petitioner Southwest Forest Industries, Inc. ("Southwest") fired respondent John L. Sutton ("Sutton"), in retaliation for filing a workers' compensation claim. Sutton was one of a number of injured employees drawing workers' compensation. Managers at the Southwest plant in Kansas City, Kansas, identified Sutton and others as malingerers who were targeted for review of their employment applications for alleged inaccuracies. (Tr. Vol. III, pp. 43-45, 48). After fabricating these alleged inaccuracies, Southwest fired Sutton. (Tr. Vol. III, pp. 49-66, 81) Sutton brought suit on June 17, 1983, relying upon the tort of retaliatory discharge created by the Kansas Court of Appeals in *Murphy v. City of Topeka*, 6 Kan. App. 2d 488, 630 P.2d 186 (1981). That decision issued on June 19, 1981.

The *Murphy* court noted the tort first was recognized in *Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973). It further noted it was odd that such a decision was so long in coming and that most "employers have simply assumed such conduct was either illegal, actionable or both." *Id.* at 192. In creating this cause of action, the Kansas court observed that it "clearly sounds in tort, and the mere existence of a contractual relationship between the parties does not change the nature of [Murphy's] action." *Id.* at 190. The court in *Murphy*, however, declined to allow the imposition of punitive damages in that case because there had been no previous recognition "that a retaliatory discharge would give rise to an action for damages." *Id.* at 193. The court warned, however, that "[p]unitive damages may, however, be

awarded in any appropriate case that arises subsequent to this opinion." *Id.*

Sutton filed his retaliatory discharge lawsuit in state court. Southwest removed it to the United States District Court for the District of Kansas. In the district court, Southwest contended that federal law barred a state law cause of action for retaliatory discharge because of the existence of a collective bargaining agreement, contending such claims were preempted pursuant to § 301 of the National Labor Relations Act, 29 U.S.C. § 185(a). The district court, relying upon *Peabody Galion v. Dollar*, 666 F.2d 1309 (10th Cir. 1981), held that a discharge for filing workers' compensation claims was not dependent upon the collective bargaining agreement and not preempted. *Sutton v. Southwest Forest Industries, Inc.*, 643 F. Supp. 662, 666 (D. Kan. 1986). *Peabody Galion* was decided December 11, 1981.

After Southwest took the instant appeal in January of 1986, the Kansas Supreme Court held in *Cox v. United Technologies, Inc.*, 240 Kan. 95, 727 P.2d 456 (1986), that unionized employees could not assert the tort of retaliatory discharge because they had an avenue or remedy for relief through interpretation of a collective bargaining agreement's just cause provision. A companion case to *Cox* was *Smith v. United Technologies, Inc.*, 240 Kan. 562, 731 P.2d 871 (1987). Sutton promptly informed the Tenth Circuit of the *Cox* decision, which issued October 31, 1986, and that court summarily reversed the district court judgment in deference to the intervening decision of the state court.

Sutton timely filed a petition for rehearing with a suggestion for rehearing *en banc*, contending that the Kansas Supreme Court had unconstitutionally deprived Sutton of tort remedies created by state law, had violated his due process right of access to redress a discriminatory discharge in the courts and had violated Sutton's right to equal protection under the law by establishing irrational classifications of employees and employers. *See Logan v Zimmerman Brush Co.*, 455 U.S. 422, 432, 439 (1982) (right to redress discriminatory discharge under state law is a property right, deprivation of which violates the due process clause).

Sutton also contended that the *Cox* rationale improperly required federal common law and arbitral authority to incorporate state public policy concerns in the interpretation of a federal contract's just cause provision. *See W. R. Grace & Co. v. Local 759*, 461 U.S. 257 (1983) (arbitral authority may not be restricted by public policy concerns inconsistent with the essence of the parties' agreement). Such an interpretation clearly would conflict with federal law and would be preempted under the same. Therefore, Sutton contended that federal law would preempt such a state rationale, a rationale that further appeared to be based on federal preemption and was an "obvious subterfuge to evade consideration of a federal issue". *Mullaney v. Wilbur*, 421 U.S. 684, 691 n.11 (1975) (*quoting Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 129 (1945)).

While the foregoing constitutional and federal preemption issues were pending before the Tenth Circuit, the same legal issues were raised in *Armstrong v. Goldblatt Tool Co.*, 242 Kan. 164, 747 P.2d 119 (1987). Upon being informed of the pendency of the *Armstrong* case, the

Tenth Circuit granted a stay of Sutton's petition for rehearing to allow the Kansas Supreme Court to address the constitutional arguments made therein. In a sharply divided 4-3 opinion, that court rejected these constitutional arguments. The dissent, in an opinion by Justice Lockett, agreed that the court unconstitutionally had deprived unionized employees of due process and equal protection of the law.

The dissent compared contractual remedies with the much broader remedies of actual and punitive damages available under the tort. In addressing the need for punitive damages under the tort of retaliatory discharge, Justice Lockett noted the following:

> There is no authority under the agreement for the arbitrator to impose punitive damages. The majority, as did the court in *Cox*, has determined that the sole rationale for recognizing the tort of retaliatory discharge is to provide the employee with a remedy. *Murphy*, however, recognized that the tort was equally necessary as a deterrent to the employer to discourage the practice of retaliatory discharge. Punitive damages exist as an available sanction against an employer who violates an important public policy of the state. The majority decision immunizes employers of union employees from the imposition of punitive damages. Thus, the remedy provided by the collective bargaining agreement is far from full and complete.

Id. at 176-177.

After *Armstrong*, the Tenth Circuit denied the petition for rehearing with suggestions for rehearing *en banc*. Thirty-two days after this denial, the Kansas Supreme

Court, in a 6-1 majority opinion by Justice Lockett, overruled *Cox*, *Smith* and *Armstrong*, in *Coleman v. Safeway Stores, Inc.*, 242 Kan. 804, 752 P.2d 645 (1988), holding that the public policy tort in *Murphy* applied to all employees and employers. *Id.* at 807. The court in *Coleman* observed that *Murphy* "took care to emphasize the tort nature of the employee's cause of action" despite the existence of any contractual relationship between the parties. The court further observed that "although the employee in *Murphy* was an at-will employee, the primary emphasis of the opinion was on the strong public policy of Kansas underlying the Workers' Compensation Act, applicable to all workers injured on the job." *Id.* at 809-10.

The *Coleman* court went on to find that the state tort action for retaliatory discharge conferred upon all employees and employers certain non-negotiable rights and duties that could not be part of a collective bargaining agreement or preempted by federal law. *Id.* at 812-13. *Coleman* said the *Cox* rationale had not fully considered the denial of a proper remedy to unionized employees and the fact that a union's emphasis is on the collective good, not with an individual employee's remedy for an employer's violation of state public policy. *Id.* at 814.

Upon learning of *Coleman*, Sutton, whose time to file a petition for writ of certiorari had not yet run, filed a motion to recall the mandate the day of the *Coleman* decision, March 25, 1988. The Tenth Circuit granted that motion and reinstated the appeal on May 10, 1988, in deference to *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and *Huddleston v. Dwyer*, 322 U.S. 232 (1944). The mandate also was recalled by the Kansas Supreme Court in *Armstrong*, but that court subsequently determined

that it could not have recalled its mandate because of statutory restrictions on its jurisdiction. Contrary to the representation in Southwest's statement, the court did not deny damages to Armstrong; it simply determined it no longer had jurisdiction over the case and could not address the merits.

After the Tenth Circuit recalled its mandate, it called for supplemental briefing as to whether *Coleman* should be applied retroactively. The court employed state law guidelines on the applicability of an overruling decision to cases that were currently pending in the courts at the time of the decision. These guidelines are set out in *Vaughn v. Murray*, 214 Kan. 456, 521 P.2d 262, 269 (1974). The factors are "(1) justifiable reliance on the earlier law; (2) the nature and purpose of the overruling decision; (3) *res judicata*; (4) vested rights, if any, which may have accrued by reason of the earlier law; and (5) the effect retroactive application may have on the administration of justice in the courts." 868 F.2d at 354.

Southwest argued to the Tenth Circuit that *Murphy* never applied to it and, therefore, that the imposition of the tort's remedies was unfair. The Tenth Circuit rejected Southwest's argument:

> Southwest argues that a tort action for retaliatory discharge did not become available to employees subject to a collective bargaining agreement until the date of the *Coleman* decision, and thus *Coleman* should be restricted to prospective application. Southwest essentially claims that it justifiably relied on the law existing at the time it discharged Sutton. We are not persuaded.

> Southwest's argument presumes that a tort action for retaliatory discharge did not exist at the time of Sutton's discharge. We disagree with this presumption, because we read *Murphy's* discussion of the public policy rationale underlying such causes of action as sufficiently broad to have provided Southwest with notice of a potential claim when it discharged Sutton over a year after *Murphy* was decided. Our view is supported by *Coleman's* reliance on the public policy rationale set forth in *Murphy*. In finding that this rationale should not be restricted to employees at will, the Kansas Supreme Court noted that "[a]lthough the employee in *Murphy* was an at-will employee, the primary emphasis of the opinion was on the strong public policy of Kansas underlying The Workers' Compensation Act, applicable to all workers injured on the job." *Coleman*, 752 P.2d at 649. Moreover, Southwest could not have relied on the holdings of *Cox*, *Smith* and *Armstrong*, because these decisions were not announced until over one year after judgment was entered against it by the district court.
>
> Finally, the *Cox* line of decisions never sanctioned an employer's retaliatory discharge of an employee filing workers' compensation claims.

868 F.2d 354-355.

The court below also disposed of Southwest's argument that the collective bargaining agreements had long provided covered employees with remedies for retaliatory discharge, noting that *Coleman* found it a "disturbing proposition" that such employees must surrender tort remedies which were not considered in the bargaining process or intended to be part of the agreement. The Tenth Circuit said *Coleman* sought to eliminate the *Cox*

immunization of unionized employers from accountability for violations of state public policy. *Id.* at 355 (*citing Coleman*, 752 P.2d at 651).

Respondent notes that Southwest has effectively abandoned all positions relating to the propriety of the judgment as to the assessment of actual damages, instead, contesting only the imposition of punitive damages.

The Tenth Circuit also addressed Southwest's argument that *Murphy* somehow precluded an award of punitive damages:

> Southwest also challenges the jury's award of punitive damages. Its main argument proceeds from the same premise as its other arguments on retroactivity: that a cause of action for retaliatory discharge for employees subject to a collective bargaining agreement was not established until *Coleman*. Southwest points to *Murphy's* refusal to allow the employee-at-will there to claim punitive damages on a cause of action for retaliatory discharge just announced in that decision. *Murphy*, 630 P.2d at 193 ("[I]nasmuch as this is the first recognition of a cause by a Kansas Court of appellate jurisdiction, we believe the allowance of punitive damages in this case would be extremely unjust.") Southwest contends that *Coleman's* extension of that cause of action to contractual employees should likewise preclude an award of punitive damages in cases pending, or decided prior to, *Coleman*. We do not agree with this argument. *Murphy* provided Southwest with sufficient notice of the potential for an award of punitive damages well over a year before Sutton was discharged.

Id. at 356. Southwest's argument that there was not sufficient evidence of retaliatory conduct to submit to the jury was dismissed as "frivolous." *Id.*

Subsequent to the Tenth Circuit's judgment on February 10, 1989, defendant hired new appellate counsel and asserted in a petition for rehearing numerous factual and legal arguments, including constitutional claims, that had never been raised before. Southwest also informed the court below of the unpublished remarks of a state trial judge in the *Coleman* remand proceedings.[1] On October 26, 1989, the court denied Southwest's petition for rehearing *en banc*. Southwest filed the instant petition on January 24, 1990, and obtained a stay of the mandate pending resolution of the petition.

SUMMARY OF ARGUMENT

Southwest's Petition for Certiorari relies solely on the ground that the Tenth Circuit abused its discretion in a straightforward application of state law in a diversity case. That court properly applied an intervening and overruling decision of the Kansas Supreme Court in *Coleman* to the instant case. Southwest's contention that the Tenth Circuit failed to give deference to an intermediate appellate court decision, *Murphy*, simply is not supported by the record and the court's careful and thorough application of *Coleman* to *Murphy*. Southwest also contends that the lower court's analysis of *Coleman* failed to take

[1] Southwest does not inform the Court in its statement that *Coleman* was settled before trial on remand.

into account the remarks of the state trial judge on remand. The *Coleman* trial judge's oral ruling did not represent a rule of decision or controlling precedent to require a different outcome. Indeed, those remarks clearly were contrary to the high court's rationale and the Tenth Circuit was not bound by them. Southwest's acquiescence in the judgment's actual damages precludes its argument that punitive damages were not properly allowed for recovery on the same action. The court below did not abuse its discretion in the application of state law upholding the jury's punitive damage award.[2]

ARGUMENT

THE TENTH CIRCUIT DID NOT ABUSE ITS DISCRETION AS A DIVERSITY COURT IN DETERMINING THAT THE STATE'S HIGHEST COURT WOULD UPHOLD THE PUNITIVE DAMAGE AWARD AGAINST SOUTHWEST FOR ITS RETALIATORY DISCHARGE OF RESPONDENT.

Southwest's petition raises no special and important reason for granting a writ of certiorari. At best, Southwest simply disagrees with the lower court's relevant analysis of state precedent. Southwest does not contest the judgment's actual damages which depends on the lower court's resolution of state law; it only questions the propriety of the award of punitive damages. It does so by

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[2] This standard of appellate review is guided by this Court's reluctance to interfere with the jury's role in deference to the Seventh Amendment. *Browning-Ferris v. Kelco Disposal, Inc.*, ___ U.S. ___, 106 L.Ed.2d 219, 240-41 (1989).

a premise rejected by the district court and court of appeals, that a cause of action for retaliatory discharge did not exist for unionized employees until *Coleman v. Safeway Stores, Inc.*, 242 Kan. 804, 752 P.2d 645 (1988), which recognized that *Murphy v. City of Topeka*, 6 Kan. App. 2d 488, 630 P.2d 186 (1981), applied to all employees and employers.

Southwest does not complain about the size of the punitive award, or that it was the subject of passion or prejudice, merely that it disagrees with the lower court's discretionary interpretation of relevant and controlling state rules of decision. Southwest's argument is boiled down to two points. The first is that the language in *Murphy* represents a rule of law that punitive damages cannot be assessed when a tort action is first created; it interprets *Coleman* as a new cause of action, rather than an overruling of a subsequent immunity. Southwest's second point is that the Tenth Circuit failed to consider an unpublished trial court ruling. Respondent will address both of these concerns respectively.

A close review of *Murphy* and the most current interpretation of that decision by the Kansas Supreme Court in *Coleman*, is that a tort cause of action was created for all employees in 1981, putting all employers on notice, without exception, that such retaliatory conduct was actionable and would thereafter support an award of actual and punitive damages. While Southwest attempts to focus upon the at-will nature of the employee in *Murphy*, this fact is incidental to the tort duty imposed therein, despite any contractual relationship.

Additionally, Southwest puts undue emphasis on the *Murphy* court's restriction there on punitive damages because, until then, "it was not clearly known to defendants, or any other employer in this state, that a retaliatory discharge *would give rise to an action for damages.*" 630 P.2d at 193 (emphasis added). Southwest elevates the language "not clearly known" into a rule of law. It is not. *Murphy* emphasized the creation of an *action* for damages. The action existed when Southwest fired Sutton. Southwest admits it caused actual damages under this action by no longer contesting that aspect of the judgment. Southwest's assumption that it was shielded against punitive damages by *Murphy*, enjoys no reasonable interpretation of that case and is squarely contradicted by *Coleman*.

Southwest takes refuge in decisions subsequent to *Murphy*, but overruled by *Coleman*, that had suggested that *Murphy* applied only to at-will employees. Contrary to Southwest's assertion, the Tenth Circuit paid ultimate deference to state law when it initially reversed the judgment below, relying on *Cox*, and then reinstated the judgment when *Coleman* overruled *Cox*. If anything, the Tenth Circuit strictly adhered to the principles espoused in *Erie* and emphasized in *Huddleston v. Dwyer*, 322 U.S. 232 (1944), where this Court required the Tenth Circuit to reconsider its decision when a subsequent overruling decision of the state's highest court intervened after denial of a petition for rehearing but while the case was *sub judice*.

The applicability of *Murphy* cannot be disputed. The Kansas Supreme Court thoroughly disposed of the premise that *Murphy* did not apply to all employees when it

emphasized in *Coleman* the tort nature of the employee's cause of action. *Coleman* further emphasized that unionized employees did not surrender these tort rights and remedies by virtue of the collective bargaining process. Southwest's argument that *Murphy* represents a limitation of punitive damages herein is flatly contradicted by *Coleman*:

> Safeway contends that the public policy determined in *Murphy v. City of Topeka*, 6 Kan. App.2d 488, 630 P.2d 186 (1981), which allows employees to bring tort claims against their employers who discharge them for filing workers' compensation claims, was properly limited to at-will employees, while Coleman argues that the public policy underlying *Murphy* must apply to all employees. We believe that Coleman is correct.

Id. at 807. *Coleman* further established that the court erroneously assumed under the *Cox* rationale that it could require the arbitration of a tort matter. Under the Uniform Arbitration Act, K.S.A. § 5-401(c)(3) (1982), Kansas law prohibits "any provision of a contract providing for arbitration of a claim in tort." *Id.* at 809. Subsequent to *Coleman*, this Court held in *Lingle v. Norge Division of Magic Chef, Inc.*, ___ U.S. ___, 108 S. Ct. 1877 (1988), that collective bargaining agreements do not preempt state common law actions for retaliatory discharge under 29 U.S.C. § 185(a).

Further evidence of *Coleman's* intent that all employees under *Murphy* be allowed to assert an action for punitive damages, is the court's analysis of the deterrent function such damages serve in promoting the public policy of the tort. *Coleman* said *Cox*, for the *first* time,

immunized unionized employers "from accountability for violations of state public policy." *Id.* at 813 (*citing Midgett v. Sackett-Chicago, Inc.*, 105 Ill.2d 143, 150, 473 N.E.2d 1280 (1984), *cert. denied*, 472 U.S. 1032, 474 U.S. 909 (1985)). *Coleman's* citation of *Midgett* is significant. There, the Illinois Supreme Court concluded that employees were not limited to contractual remedies and required the availability of punitive damages to deter such conduct in the future.

> If there is no possibility that an employer can be liable in punitive damages, not only has the employee been afforded an incomplete remedy, but there is no available sanction against the violator of an important public policy of the state. It would be unreasonable to immunize from punitive damages an employer who unjustly discharges a union employee, while allowing the imposition of punitive damages against an employer who unfairly terminates a non-union employee. The public policy against retaliatory discharges applies with equal force in both situations.

473 N.E.2d at 1284.

There would have been no reason for *Coleman* to cite *Midgett* if it did not intend *Murphy* to allow punitive damages to be assessed in all instances of retaliatory discharge. Indeed, Southwest cannot contend that it was ignorant of the law, because no judicial decision ever sanctioned the retaliatory conduct at stake.

In the face of this very strong public policy that all employees under *Murphy* deserve the protection of the law and the deterrence of punitive damages, Southwest

resorts to the *Coleman* trial judge's erroneous interpretation of the supreme court's opinion on remand when he sustained a motion in limine to preclude punitive damages.

A federal appellate court's duty, in exercising diversity jurisdiction, is to follow a state supreme court decision changing the applicable state law. *Bradley v. Richmond School Board*, 416 U.S. 696, 713 n.17 (1974) (*citing Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 542-43 (1941)). Despite Southwest's assertion that the Tenth Circuit failed to give much, if any, weight to the *Coleman* trial judge's unpublished ruling, this Court has stated that such decisions of state trial courts are not controlling in a diversity action. *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967). Indeed, the Tenth Circuit has noted that unreported, unpublished decisions of state district courts are of little value in considering the course the state's highest court might take. *State Farm Mutual Auto Insurance Co. v. Travelers Indemnity Co.*, 433 F.2d 311 (10th Cir. 1970).

Southwest ignores the fact that unpublished appellate opinions have no precedential value and are not citable in Kansas courts. Kansas Supreme Court Rule 7.04 specifically states, in pertinent part:

> All memorandum opinions, unless otherwise required to be published, shall be marked: "Not Designated For Publication." *Since unpublished opinions are deemed to be without value as precedent* and are not uniformly available to all parties, opinions so marked shall not be cited as precedent by any court or in any brief or other material presented to any court, except to support a

> claim of res judicata, collateral estoppel, or law of the case. (Emphasis added.)

Petitioner attempts to ignore this prohibition by stating that federal courts follow their own procedural rules in determining the existence of state law. *See* footnote 6 to petitioner's brief. Southwest misses the point. The mandate of the Rules of Decision Act, 28 U.S.C. § 1652, is that the laws of the several states shall be regarded as rules of decisions in civil actions in the courts of the United States. This Court has held that judicial decisions are laws of the state within the definition of the act. *King v. Order of Travelers*, 333 U.S. 153, 157 (1947).

In *King*, the Court held that a federal court, applying local law in a diversity case, is not bound to follow a decision of a state trial court where such decisions are not regarded by the state courts as binding precedent. Such decisions, therefore, are not necessarily rules of decision within the meaning of the act. *Id.* at 161.

In *King*, the Court considered the relative status of a state trial court in determining to what extent a federal diversity court should pay heed to its rulings. There, this Court held that the court of common pleas in South Carolina was not a court whose pronouncements deserved controlling or even persuasive evidence on the subject of the predicted rulings of that state's highest court.

> While the Courts of Common Pleas are denominated courts of record, their decisions are not published or digested in any form whatsoever. They are filed only in the counties in which the cases are tried, and even there the sole index is by the parties' names. Perhaps because these facts preclude ready availability to bench and

> bar, the Common Pleas decisions seem to be accorded little weight as precedence in South Carolina's own courts. In this connection, respondent has submitted a certificate from the Chief Justice of the Supreme Court of South Carolina to the effect that "under the practice in this state an unappealed decision of the Court of Common Pleas is binding only upon the parties who are before the Court in that particular case and would not constitute a precedent in any other case in that Court or in any other court in the State of South Carolina."

Id. at 160.

A federal court adjudicating state law in a diversity suit is, the Court said, in effect, only another court of the state. It would be incongruous to hold a federal court bound by a decision that would not be binding on any other state court. *Id.* at 161. A practical reason for precluding such state trial court decisions is the fact that litigants can only find the decisions on any given subject only by laboriously searching all the judgment rolls in a state's counties. *Id.* To hold that a federal court must abide by such trial court decisions would put a premium on the financial ability required for exhaustive screening of all the dockets in the state, the Court said. *Id.* at 161-62. Further, "in cases where the parties could not afford such practices, the result would be often to make their rights dependent on chance; for every decision cited by counsel there might be a dozen adverse decisions outstanding but undiscovered." *Id.* at 162.

In the instant case, the Kansas Supreme Court, by rule, has determined that unpublished appellate decisions have no precedential value. Certainly unpublished decisions of Kansas trial courts, which never publish, can

have no greater precedential value and cannot be considered "rules of decision" by the federal courts. While such courts may be courts of record, they do not bind any other trial court. Southwest asks this Court to rely upon not even a written decision, but oral remarks from the bench in a matter that was settled before trial. Indeed, if the law were different, respondent would have to search all the judicial districts in Kansas to yield additional cases on this subject. However, the Tenth Circuit sufficiently interpreted the Kansas Supreme Court's intent in *Coleman* to determine the applicable law.

While Southwest contends the Tenth Circuit ignored consideration of any additional proceedings in the *Coleman* case at the trial level, the record reflects that Southwest was given an extended period of time to file its Petition for Rehearing and an oversized Petition. All the matters asserted herein were attached to Southwest's brief to the Tenth Circuit. There is no reason to believe that the Tenth Circuit did not duly consider and reject out of hand the meritless claims advanced before that court. Indeed, the Tenth Circuit was barraged on rehearing with new constitutional issues about the Eighth Amendment, the due process and equal protection clauses, as well as a host of factual and legal issues never before raised. Many of these arguments have the clear appearance of an afterthought.

A case in point is Southwest's suggestion that the question of law herein be certified to the Kansas Supreme Court. No such suggestion had ever been made until an adverse ruling by the Tenth Circuit panel. Counsel herein specifically recalls previous appellate counsel for Southwest Forest informing the Tenth Circuit that Southwest

had considered and rejected the certification option, even after the court's order for supplemental briefing, and did not request the same at oral argument. Plaintiff's counsel objected to certification because of the additional delay that would entail.

Southwest's suggestion that the Tenth Circuit was indifferent to Kansas law because no party requested certification unfairly characterizes the studied resolution of this case by the court below.[3] Certification is a matter of discretion and is not obligatory on the federal courts. In *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974), this Court said "the mere difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for the start of another lawsuit. We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory." *Id.* at 390-91. No abuse of discretion occurred in this area.

Finally, Southwest's tangential reference to equal protection in its argument head, but without any citation of authority in its petition, constitutes a waiver of any apparent constitutional issue. Moreover, no such issue was timely raised before the court below.

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[3] Southwest's complaint about certification ought to be subject to estoppel by virtue of its failure to request the same before judgment. *See Armijo v. Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988)("We note the plaintiff did not request certification until after the district court made a decision unfavorable to her.")

CONCLUSION

Respondent would respectfully submit that this case presents no significant and important reason for granting a writ of certiorari. At best, this is a singular case, the conclusion of which will serve the public policy of Kansas in deterring employers like Southwest from similar discharges. This is the only published decision to date since the tort was created in 1981 to result in a jury verdict. Petitioner has taken the same shabby corporate conduct throughout the trial and appeal of this matter and attempted to clothe it with new legal and factual arguments at every turn. Unraveling these arguments, however, leaves Southwest stripped of its "ignorance of the law" veil to expose the same misconduct that led the jury in this case to award punitive damages. The court below did not abuse its discretion in affirming that determination.

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